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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 232

ROBERT E. FUNKHOUSER AND ELEANOR E. FUNKHOUSER,
*Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

ROBERT E. FUNKHOUSER
*Petitioner*
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, Robert E. Funkhouser and Eleanor E. Funkhouser, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on April 9, 1956.

### DECISIONS BELOW

The decision of the Tax Court of the United States is printed as Appendix A, infra.

The decision of the Court of Appeals for the Fourth Circuit is printed as Appendix B, infra.

The order of the Court of Appeals for the Fourth Circuit granting a rehearing is printed as Appendix C, infra; the rehearing was held on March 21, 1956 and the judgment of the Court was entered on April 9, 1956 and is printed as Appendix D, infra.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 7, 1955 (Appendix B).

Rehearing was granted on December 16, 1955 (Appendix C).

Rehearing was argued on March 21, 1956 and was denied on April 9, 1956 (Appendix D).

The jurisdiction of this Court is invoked under Title 28, Section 1254.

## THE QUESTIONS INVOLVED

1. Did the Court of Appeals for the Fourth Circuit err in refusing to reverse the decision of the Tax Court which was based on a stipulation forced on Petitioners by duress, intimidation, impoverishment, threats, fear and coercion, without either Respondent or Petitioners knowing how much tax and penalties were being set up in the stipulation?

2. Did Respondent mislead the Court by misstating the facts?

3. Was Petitioners' constitutional rights to due process denied by this decision of the Tax Court which was based on this stipulation forced on Petitioners under conditions which Respondent had no right to make?

4. Did the Tax Court and the Court of Appeals for the Fourth Circuit err in refusing to set aside a judgment based on error in the assessment of these taxes and penalties?

## STATEMENT OF THE CASE

The facts in the case are not in dispute. They are clearly stated by Respondent in his testimony before the Tax Court, the United States District Court for the District of Maryland, the Court of Appeals for the Fourth Circuit, and in Respondent's letters as set out in the Appendix hereto. They were clearly called to the attention of the Court below in the briefs filed in that Court, certified copies of which are attached to this petition.

## THE FIRST QUESTION

This testimony shows that Respondent engaged in a seven year siege of coercion, intimidation, impoverishment and threats to force the signing of the stipulation. Without making any audit, calculation or tabulation (Appendix 31a-32.), list of the items disallowed (Appendix 61a.) count of the items (Pet. Br. 6.), or even any "attempt to analyze the listed items of expense" in Petitioner's income tax returns he would have to disallow for the assessment of any taxes (Appendix 56a.), and without making any assessment of any taxes, Respondent went into the United States District Court for the District of Maryland and had his agent "assume" that some taxes might be due (Appendix 45a.), and Respondent on that "assumption" had Petitioner fined $25,000.00 and sentenced to prison for the evasion of taxes which had never been assessed, calculated, or tabulated (Appendix 31a-32a.) and then after he had sent Petitioner to prison for the evasion of these taxes which had never been

assessed, calculated, tabulated, listed or the items involved even counted (Appendix 50a.) or analyzed (Appendix 50a.) he opposed Petitioner's release from the prison on parole after Petitioner had served enough time in prison to become eligible for parole, on the ground that Petitioner "had not paid his assessed taxes". (See record of Parole Board in Criminal Case No. 21794.)

Respondent then seized and took all of Petitioner's money from Petitioner's bank account, filed jeopardy assessments and tax liens on all of Petitioner's property, took and collected all of Petitioner's notes and money and repeatedly threatened to sell all of the property if the stipulation was not signed immediately (Appendix 55a, 62a).

Respondent then had Petitioner's counsel, who was permitted to represent Petitioner only on the permission, consent and approval of Respondent, sign the stipulation, and then Respondent took over the counsel and had the counsel appear as his (Respondent's) witness against Petitioner before the Tax Court (Appendix 58a-61a).

**Petitioners Ask This Court to Review and Condemn This Coercion**

This case was started nine years ago by one of Respondent's special agents who testified that he began it by working overtime and late into the night by following Petitioner about the streets of Washington, D. C., and the roads of Maryland for the purpose of "supplementing the family income" (Appendix 20a.) and that same special agent continued to work the case aggressively for the following seven years (Appendix 20a-21a, 48a). The special agent found that all gross income and all expenses were recorded in the income

tax returns as filed (Appendix 22a-31a.) but when his family income was not "satisfactorily supplemented" Respondent permitted him to spend the next three quarters of a decade forcing this settlement by the methods described by Respondent in his testimony in the record of the case, excerpts of which are printed in the briefs filed in the Court below and in the Appendix hereto.

**Respondent's Testimony Shows That He Found That All Gross Income and All Expenses Were Reported in the Returns That Were Filed and That No Taxes or Penalties Were Properly or Legally Assessable**

**Respondent's Testimony Shows:**

**All Gross Income Was Reported**

1. Respondent found that petitioners had filed Income Tax returns for each of the years in which they had reported all of their gross income. (Appendix 25a, 31a, 63a) and (Pet. Br. 4.)

**All Expenses Were Reported**

2. Respondent found that all expenses were reported and he told the Tax Court that he found that 95 per cent of those expenses were allowable and were allowed. He testified:

> "Every check that he was able to produce, and he produced 95 per cent of them, were itemized by numbers, were placed in various categories. Those were allowed. There was no question about it. They were allowed as deductions from Gross income". (Appendix 63a.)

3. Respondent told the Tax Court that he found the other five per cent of the listed expenses recorded in the books and records in minutest detail. (Appendix 24a-31a, 64a.) Respondent testified:

> "Finally it came to the questionable items. What did these items represent? They go from 25 cents up to $400.00—some in some cases. I honestly believe that there is at least 10,000 Income items in dispute in this case . . ." (Appendix 64a.)

4. Respondent testified that he made no audit, calculation or tabulation of the items in dispute (Appendix 31a-32a).

5. Respondent told the Tax Court that he made no attempt to analyze the questioned items of expense; he testified:

> "And realizing the enormity of attempting to analyze some 20 or 30 thousand individual items I told them (the boys) we would adopt the theory of the Cohen rule and split it down the middle". (Appendix 56a.)

6. Respondent made no inquiry about the particular items. He testified:

> "I did call his attention in the various interviews to the specific checks, but whether I did in this particular one, I am not sure, Your Honor." (Appendix 32a.)

7. Respondent never made up a list of the items he claimed to have disallowed and Respondent forced the signing of the stipulation and the Tax Court decision in this case without ever having any list of the items on which it was based. Respondent testified:

> "The government didn't give me any list; and as a matter of fact, they didn't have a list and didn't make it up and the settlement was finally effected as Mr. Butrum described it, by an arbitrary decision of these items in dispute. So I didn't have any list of them. I just had the figure". (Appendix 61a.)

8. Respondent testified before the Tax Court that he made no list, count, tabulation, calculation, or attempt to analyze the items he disallowed for the assessment of these taxes and penalties but that he just estimated them to number:

> "3,000 as estimated by Mr. Waring (Appendix 64a.)
> 7,000 as estimated by Mr. Butrum (Appendix 55a.)
> 10,000 as estimated by Mr. Waring (Appendix 64a.)
> 14,000 as estimated by Mr. Roberts (Appendix 62a.)
> 2 or 3 suitcases full as estimated by Mr. Luce (Appendix 59a.)
> 20 or 30 thousand items as estimated by Mr. Butrum" (Appendix 56a.)

9. Respondent testified before the Tax Court that he had disallowed whole columns of items without knowing why the columns were in there at all, as they were totally meaningless to him. He said:

> "Well I don't know why that column is in there at all. As a matter of fact; it is totally meaningless so far as our settlement was concerned. Whether you were or were not guilty of fraud with respect to the particular items in your Criminal Case was no concern to me in settling your Civil Tax liability". (Appendix 57a.)

10. Respondent testified that for the assessment of these taxes and penalties he just took some figures and applied what in his judgment he could get. He testified:

> "We take the total sum and apply in what in our judgment is a reasonable figure to apply". (Appendix 56a.)

11. Respondent testified that for the stipulation in this case he disallowed all the items questioned by his special agent. (Appendix 57a.)

**And Respondent's Special Agent Testified That He Disallowed**

a. All automobile expenses in the entirety (Appendix 33a.)

b. Items never expensed (Appendix 33a.)

c. Depreciable items without allowing any depreciation (Appendix 34a.)

d. Items disallowed without any reason (Appendix 41a-45a.)

e. Just assumed that some taxes were due (Appendix 45a.)

f. Set up a bogus list of disallowed items (Appendix 46a.)

**And the Record Shows That the Special Agent Knowingly Testified Falsely as to:**

a. The sale of some of the property. (Appendix 35a.)

b. Petitioner's contentions as to the use of some of the property. (Appendix 36a-41a.)

**Petitioners Ask This Court to Please Review the Assessment of These Taxes and Penalties on This Basis. Petitioners Contend That No Taxes or Penalties Should be, or Can be, Legally Assessed as These Taxes and Penalties Have Been Assessed. Petitioners Ask This Court to Consider and Disapprove the Coercion Used by Respondent to Force the Signing of the Stipulation in This Case**

**THE SECOND QUESTION**

Did Respondent mislead the Court below by misrepresenting the facts?

Petitioners petitioned the Court of Appeals for the Fourth Circuit to review the case on the ground that Respondent had made many mistakes in the assessment of the taxes and penalties and in the application of the money seized and taken by Respondent.

Respondent in his brief in opposition to a rehearing told the Court:

> "The difference of $7,657.47 between the amount of $32,487.97 seized and collected from taxpayers and the amount of $24,830.50 shown as having been paid by them in the stipulation for entry of the decision by the Tax Court consists entirely of interest assessed for the year 1941 in the amount of $2,626.67 and interest as finally determined for the year 1942 in the amount of $5,030.80. These two items of interest total exactly $7,657.47, the amount of the alleged discrepancy." (Res. Br. in opposition to rehearing pages 2-3.)

That contention by Respondent is proved to be untrue by his own "Statement of Accounts" as set out at the top of page 14 of that same brief. In that statement Respondent shows that there were discrepancies made in his application of the seized money in each and every one of the years. And they do not agree with the figures Respondent set out in the stipulation. And the Respondent admits that he made mistakes in the application of the seized money in each and every one of the years, he says on page 12 of that same brief:

> "This statement indicates that the taxpayers have made a net overpayment of interest for the period involved to the extent of $990.31. It will be noted that in some years the taxpayers have underpaid the interest required to be imposed on them by statute and that in other years they have overpaid such interest." (Res. brief in opposition to rehearing page 12.)

Respondent's statement to the Court below that the discrepancy in the credit of the seized money as set out in the stipulation was exactly $7,657.47 and applied to interest in the years 1941 and 1942 is also proved untrue by his disgorging the sum of $842.15 for the year 1943 as shown on the photostat of Respondent's refund check of February 8, 1956. (Appendix page 20 of Petitioner's reply brief to petition for rehearing before the Court of Appeals.) Copy of which is certified and attached hereto.

Respondent repeatedly told the Tax Court and the Court below that he had supplied Petitioner with full information as to how these taxes and penalties had been assessed and how the figures for the stipulation had been arrived at. (Appendix 49a.) This also is proved untrue by Respondent's testimony before the Tax Court when he testified:

> Q. By Mr. Funkhouser: Did you ever give me a list of any of the items disallowed in this case?
> A. By Mr. Butrum: Mr. Funkhouser, I told you a number of times we did not give you any; neither do we intend to. (Appendix 50a.)
> Q. By Mr. Funkhouser: Have you ever given me any items?
> A. By Mr. Butrum: I have not given you any list of any items. (Appendix 51a.)

**Respondent Had Never Made Up Any List of the Items He Would Have to Disallow for the Assessment of Any Taxes**

> Q. By Mr. Funkhouser: Did you ever give me any list of the items that were disallowed in this case?
>
> A. By Mr. Luce: Mr. Funkhouser, I never had a list . . . the government didn't give me any list; and as a matter of fact, they didn't have a list and didn't make it up . . ." (Appendix 61a.)

Petitioners contend that no taxes and penalties could properly be assessed on that basis and they ask this Court to reverse the decision of the Court below which affirmed the decision of the Tax Court which had made such an assessment.

And Petitioners ask this Court to disapprove these methods used by Respondent to force the counsel to sign the stipulation in this case.

Petitioners contend that when they filed income tax returns in which they reported all of their gross income and all of their expenses they complied with the requirements of the Internal Revenue Code and they should not thereafter be subjected to a fine, imprisonment, the seizure and taking of all of their property and money; a dozen different claims for a dozen different amounts claimed (Pet. Br. 38-39.) many years of coercion and impoverishment, threats to sell the property and break Petitioner (Appendix 61a). All of which was done by Respondent to force the settlement by the stipulation complained of.

**THE THIRD QUESTION**

Was Petitioners' constitutional rights to due process denied by this decision of the Tax Court which was based on a stipulation forced on Petitioners' counsel under conditions which Respondent had no right to make?

Petitioners contend that they filed income tax returns for all of the years involved in which they reported all of their gross income and all of their expenses. (Appendix 25a, 31a, 33a.) That they had a right to believe that those income tax returns were satisfactory, and complied with all of the requirements of the Internal Revenue Laws. That they had filed similar

returns for many years exactly like these returns and Respondent had examined many of those returns and had approved them (Appendix 9a-19a).

Now, here, in this case Respondent has found all gross income and all expenses reported and has found that 95 per cent of all of the expenses were allowable and they were allowed (Appendix 63a.) and the other 5 per cent of the expenses were listed in such great detail in the books and records that they were not audited, calculated or tabulated (Appendix 32a.) listed (Appendix 61a.), counted to see if there were 3,000 or 5,000 or 7,000 or 10,000 or 14,000 or 15,000 or 2 or 3 suitcases full or 20,000 or 30,000 items as estimated by Respondent (Appendix 54a, 55a, 56a, 59a, 62a).

And Respondent without making any audit or assessment of any taxes, or holding any conference with Petitioner to discuss the assessment of any taxes, went into the United States District Court for the District of Maryland and "ASSUMED" that if Petitioner had a net income he would owe some tax (Appendix 45a.) and Respondent testified falsely as to Petitioner's contentions as to the date of the sale and use of some of the property (Appendix 35a-41a).

Respondent did these things to soften Petitioner up for the settlement complained of in this case, and then he filed jeopardy assessments, attachments and tax liens on all of Petitioner's property and seized and took all of Petitioner's money from his bank accounts to further soften Petitioner up for the signing of the stipulation and settlement and the Tax Court decision complained of.

And to further confuse and confound and coerce Petitioner and force him to sign the stipulation Re-

spondent refused to give him "ANYTHING" (Appendix 51a.) but Respondent did make up a dozen different claims for a dozen different sums of money ranging from $17,000 to $364,814.49 (Pet. Br. 38-39.) and repeatedly threatened to sell all of Petitioner's property to collect that money if the stipulation was not promptly signed. (Appendix 58a-61a.)

Petitioners ask this Court to please review this case and correct the injustice here pointed out.

**THE FOURTH QUESTION**

Did the Tax Court and the Court of Appeals for the Fourth Circuit err in refusing to set aside the judgment based on error in the assessment of these taxes and penalties?

Petitioners have pointed out the testimony in which Respondent has testified that these taxes and penalties were assessed without having made any audit, calculation, tabulation, list, count or any attempt to analyze the individual items, or any inquiry about the particular items, or the specific checks which were disallowed for the assessment of the taxes and penalties.

And Petitioners have pointed out the testimony by Respondent where he testified that these taxes and penalties were assessed by his agent as follows: "We take the total sum and apply in what in our judgment is a reasonable figure to apply" (Appendix 56a).

And Petitioners have pointed out the testimony by Respondent that Petitioners had complied with the requirements of the Internal Revenue Code by reporting all of their gross income (Appendix 25a, 31a, 63a.) and all expenses, "95 per cent of which were found to be allowable and were allowed" (Appendix 63a).

And Petitioners have pointed out the testimony by Respondent showing that whole columns of figures were disallowed by Respondent without "knowing why the column was in there at all. As a matter of fact; it is totally meaningless so far as our settlement was concerned" (Appendix 57a).

And Petitioners have pointed out the pressure exerted by Respondent to force the signing of the stipulation, the surveillance, fine, imprisonment, jeopardy assessments, tax liens, attachments, seizure and taking of all money and property, refusal to disclose the basis of any claims and assessments, threats to sell all of the property and "break" Petitioners.

Petitioners contend that the Congress provided in the Internal Revenue Code the exact method of assessing taxes and penalties and then gave Respondent the right to make a jeopardy assessment, place tax liens and seize and take the taxpayer's property if the properly assessed taxes were not paid or there was reason to believe that the taxpayer would conceal or dispose of the property to avoid the payment of the properly assessed taxes.

In this case Respondent placed the jeopardy assessments, tax liens, seized and took all of Petitioner's property, had Petitioner fined and imprisoned and kept in prison for evading and failing to pay taxes never assessed; and Respondent used those extreme and harsh means to force Petitioner's counsel to sign the stipulation for the assessment of these taxes and penalties.

Petitioners contend that if this Court permits these taxes to be assessed in this manner then the ownership of any business or property has become a liability. Any Internal Revenue Agent can follow any tax-

payer about until he finds some money or property to attach, and then without making any audit, tabulation, calculation, count or list he can attach, seize and take all of the property and money and have the taxpayer fined and put into prison and kept there for evading taxes the agent proposes to assess, or assumes he will assess, (Appendix 45a.) and he can seize and keep the property until the taxpayer agrees to pay whatever sum the agent chooses to assess: as Respondent said, "We take the total sum and apply in what in our judgment is a reasonable figure to apply" (Appendix 56a).

This method of assessing these taxes and penalties has been affirmed by the Court below and when it was pointed out to that Court that Respondent admitted that he had not even kept an accurate record of the money he had seized and taken to force the signing of the stipulation the Court said:

> "As the crediting of collections under the jeopardy assessment is not a matter which could effect the amount of the consent judgment entered by the Tax Court, it is not a matter which would justify a rehearing of the cause. If the taxpayer is entitled to any moneys collected under the jeopardy assessment which have not been properly credited against his tax liability, he has a remedy by suit therefor in a proper court, if they have not been refunded to him in the meantime." (Appendix 8a.)

Petitioner asks this Court to review this case and dismiss this judgment.

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June 28, 1956